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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition of MCI for	)	CC Docket No. 96-98
Declaratory Ruling	)	CCBPol 97-4
	)	
	)	

REPLY COMMENTS OF SPRINT

Sprint Corporation ("Sprint") respectfully submits its reply comments in the above-captioned proceeding.

SUMMARY

The provision of unbundled network elements by incumbent local exchange carriers (ILECs) to their competitors is unlikely to raise issues concerning the intellectual property (IP) rights of third parties. Thus, the Commission should decide these issues on a case-by-case basis. The Commission should nevertheless clarify, consistent with past proceedings, that ILECs have an obligation to obtain any licenses necessary to provide such unbundled elements to third parties.

The Commission should also be skeptical of claims by ILECs that the provision of unbundled elements potentially infringes on the IP rights of third parties; in the past, the Bell Operating Companies have proposed to give others

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extensive control over ILEC network functions without even mentioning possible IP issues that would be raised thereby.

In its Infrastructure Sharing docket, the Commission held that IP concerns were not an excuse for ILECs to avoid their obligation to share their networks with qualifying carriers and required ILECs to obtain any necessary licenses to comply with their duties. The same outcome should occur here.

Although the obligation upon ILECs to obtain any licenses necessary to provide unbundled elements should be a heavy one, neither should ILECs be strictly liable for failure to obtain such license after good faith attempts to do so.

The proposed solution of the Public Utility Commission of Texas should not be adopted by the Commission because it places too great a burden upon an ILEC's competitors and is likely to delay the onset of competition.

The comments of SBC Communications, Inc. greatly overstate the likelihood that an ILEC's provision of unbundled elements will infringe on the IP rights of third parties. In any event, the solutions proposed in response to the hypothetical IP issues raised by SBC are likely to be unworkable, are commercially unreasonable, and will delay the onset of competition.

I. *The Commission Should Proceed on a Case-by-Case Basis Because it is Unlikely that Intellectual Property Issues will be Raised by the Provision of Unbundled Network Elements.*

Several commenters support Sprint's argument that decisions concerning third party IP rights that may be embedded within unbundled network elements should be decided in the context of individual contracts rather than in a generalized declaratory ruling.[1] Given the many different contracts that govern the relationships between ILECs and their vendors,[2] case-by-case rulings are appropriate.

That the Commission should proceed on a case-by-case basis is confirmed by the commenters who shared Sprint's view that it is unlikely that the provision of unbundled network elements to competitive local exchange carriers (CLECs) implicates a third party's IP rights. Nortel, an important vendor of telecommunications equipment, for example, states that it "does not want to over-emphasize these [intellectual property] concerns" and that its

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[1] *See, e.g.*, Comments of BellSouth at 2, 3 ("The initial finding that MCI asks the Commission to make - that third party intellectual property rights are not implicated in the sale of unbundled network elements - is a very fact specific inquiry involving potentially complex issues of intellectual property law"); Comments of Bell Atlantic and NYNEX at 3; Comments of Northern Telecom ("Nortel") at 5 ("Depending on where the unbundling occurs, access to particular unbundled network elements may implicate certain vendor rights.")

[2] *See, e.g.*, Comments of SBC Communications at 9. Comments of Nortel at 6 ("no additional vendor rights appear to arise where the customer's contractual limits on its use of such equipment and/or software would continue to apply to the requesting telecommunications carrier's use of the unbundled network element.")

concerns "typically will not arise if the request for unbundled network elements can be accommodated by Nortel's customer in a manner that does not require that the requesting party be given direct access to Nortel's software or proprietary information."

While Sprint believes that IP issues raised by the provision by ILECs of unbundled network elements should be resolved on a case-by-case basis, it does not agree with those commenters who suggest that there is no role for the Commission here and that this matter is one exclusively for state commissions and the courts.[3] In para. 88 of its Notice of Proposed Rulemaking in CC Docket No. 96-98, the local interconnection proceeding,[4] the Commission specifically noted that

> In addition to technical feasibility, section 251(d)(2) requires that the Commission "consider, at a minimum, whether . . . access to such network elements as are proprietary is necessary, and [whether] the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." We seek comment on the extent to which the Commission must "consider" these standards, how these standards should be interpreted, and on any additional considerations, such as possible risks to network reliability or other harm.

It is necessary and appropriate for the Commission to interpret Section 251(d)(2) as requiring it to determine

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[3] *See, e.g.*, Comments of BellSouth at 3; Comments of Bell Atlantic and NYNEX at 2. *See also* the Comments of Ameritech, GTE and Nortel.

[4] FCC 96-182, released April 19, 1996.

whether and how a network element that may involve proprietary information should be made available. MCI's Petition for Declaratory Ruling, as well as the Local Exchange Carrier Coalition's Petition for Reconsideration of the First Report and Order in CC Docket No. 96-98,[5] are suitable procedural vehicles for the Commission to clarify its statements on this subject in the First Report and Order.

II. *In View of the ILECs' Past Practices, the Commission Should be Skeptical of Claims that the Provision of Unbundled Network Elements will Raise Issues of IP Infringement.*

In its Comments, AT&T observes that

> [N]umerous LECs, including those that now raise these intellectual property claims, have for years similarly provided interexchange carriers and independent LECs with dedicated facilities and unbundled access to network capabilities that provide the same degree of control as access to network elements, without raising any claim that such provision violated any party's intellectual property rights. Nor, to AT&T's knowledge, did any vendor raise objections in relation to the provision of those facilities and their functionalities.

AT&T Comments at 21.

Sprint concurs with AT&T that the Commission should be skeptical of claims that third parties' IP rights will be infringed by the provision of unbundled network elements to

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[5] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 96-325, released August 8, 1996,

CLECs. As Sprint previously stated, its LECs have to date never refused to provide unbundled network elements on the basis of intellectual property concerns, Sprint Comments at n. 2. Moreover, as AT&T pointed out and as Sprint amplifies below, at least two of the commenters here who opposed MCI's petition have previously proposed "Advanced Intelligent Network (AIN)" offerings that contemplate extensive control by customers over ILEC network functions without even mentioning potential IP concerns.

BellSouth announced in its July 7, 1993 Supplemental Comments in the Intelligent Networks proceeding (CC Docket No. 91-346) an "extensive framework for third party logical interconnection to the advanced intelligent network." As described by BellSouth,

> All of the proposed interfaces will give third party service providers access to AIN messages. The messages may be trigger messages, queries, call control commands, or information exchange messages. These messages usually occur in query/response pairs, where the query represents an AIN trigger message or database query, while the response represents the returned data item or AIN command.

Id. at 8-9.

With AIN, third parties could remotely program telephone company switches to create customized communications features both for themselves and for others. If market demand warranted and tests were successful, Bell

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review pending sub nom. Iowa Utilities Board, et al. v. FCC, No. 96-3321, Eighth Circuit.

Atlantic in 1992 anticipated that within a few years, third parties, using a personal computer with a mouse, icons, and user friendly commands, could access its network remotely to design new services.[6]

Bell Atlantic also anticipated that it would perform a gatekeeper function for third parties who had access to remote databases unaffiliated with the telephone company. As Bell Atlantic put it,

> The gatekeeper will consist of an adjunct processor, which will receive the service operation instructions and data supplied by multiple vendors validate them in real time, and provide information to the switch so that it can execute the commands without causing harmful interaction or technical failure. The processor will, in effect, filter out inconsistent, improper, and incomprehensible instructions. It will also ensure the privacy of a customer's communications and of information regarding the services and vendors that customer has selected.
> *Id.* at 7 (fns. omitted).

As should be obvious from their previous comments, the BOCs can, when it suits their interests, provide third parties with extensive capabilities to instruct and interact with their networks without raising concerns as to the IP of third parties. If the Sprint ILECs generally believe they can negotiate license agreements with their vendors that enable them to provide unbundled network elements without raising IP concerns, there is no apparent reason why the

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[6] *See* Bell Atlantic Comments in CC Docket No. 91-346, March 3, 1992 at 6.

much larger Bell Operating Companies (BOCs) could not do the same if required.

III. *The Commission's Actions in the Infrastructure Sharing Docket Support a Requirement that ILECs Obtain License Modifications Necessary to Provide Unbundled Elements.*

In its recent Report and Order issued in CC Docket No. 96-327, the Infrastructure Sharing proceeding,[7] the Commission said that additional licensing to address ILEC IP concerns will almost always be unnecessary for the ILECs to engage in the sharing of their infrastructure with qualifying carriers. The Commission further held that if such licensing was necessary, the ILECs were required to secure the additional license.

In the *Infrastructure Sharing Order*, the Commission observed that ILECs could fulfill their infrastructure sharing obligations to qualifying carriers "through the use of agreements whereby providing incumbent LECs who own or lease certain types of information or other intellectual property provide functionalities and services to qualifying carriers without the need to transfer information that is legitimately protectable." *Infrastructure Sharing Order* at para. 70.

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[7] Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, FCC 97-36, released February 7, 1997 ("Infrastructure Sharing Order").

In the few instances where legitimate IP concerns might actually exist, the Commission made clear that "incumbent LECs may not evade their section 259 obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate - or allow - provision of certain types of information to qualifying carriers." Rather, in cases where the only means available was to include the qualifying carrier in a licensing arrangement, "the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly." *Infrastructure Sharing Order* at para. 70. Sprint believes the identical procedure should be applied here.

IV. *Although an ILEC's Obligation to Negotiate Any License Modifications Necessary to Provide Unbundled Network Elements Should be a Heavy One, Neither Should ILECs be Strictly Liable for Failure to Obtain Necessary Modifications.*

While Sprint believes it is appropriate to impose a significant obligation on ILECs to negotiate any license modifications necessary to provide unbundled elements, Sprint disagrees with AT&T's suggestion that an ILEC is under an absolute duty to provide unbundled network elements. Sprint also disagrees with AT&T's implication that the ILEC violates Section 251(c)(3) of the Communications Act if the ILEC is unable to provide an unbundled network element because its vendors prevent the ILEC from doing so despite the ILEC's best efforts.

It is unfair to impose strict liability on an ILEC, as AT&T seems to contemplate, for the ILEC's failure or inability to negotiate any needed license agreement or extension after good faith attempts to do so. Sprint believes it would be arbitrary and capricious for the Commission always to assume that the ILEC failed to do so because it was trying to stifle competition or simply was not trying hard enough, particularly if the Commission adopts Sprint's suggestions of ways to motivate ILECs to reach agreement with their vendors. The vendor can refuse the requested license for any reason or for no reason, and the ILEC should not be made to account for the decisions of an unregulated vendor which the ILEC, in the final analysis, does not control.[8]

V. *The Commission Should Not Adopt the Solution Offered by the Public Utility Commission of Texas; it is Inadequate and Unnecessarily Burdens Competition by CLECs.*

Sprint disagrees with the solution proferred by the Public Utility Commission of Texas ("PUCT"). PUCT contends that it is reasonable for the ILEC (in this case, Southwestern Bell Telephone Company (SWBT)) to provide a

[8] SBC pointed out at page 17 of its comments that an ILEC's failure to acquire authorization from a third party could stem from "the conventional operation of the intellectual property laws as reflected in conventional license agreements in general use for many years."

list of third parties whose IP rights *may* be implicated when a new entrant utilizes SWBT's unbundled network elements.[9] It would then be up to the CLEC (in this case, AT&T) to contact scores of third parties to determine whether IP rights have been violated, and to negotiate any necessary licenses. In the meantime, the ILEC would apparently be able to withhold provision of the unbundled elements in question, as AT&T has alleged SWBT has done.[10]

Such a course would require a vast investment of time and resources by the CLEC and delay the CLEC's ability to enter the market. As the commenters point out,[11] such delay works only in favor of the ILEC. As Sprint and others[12] also pointed out, the ILEC negotiated each of these agreements with its vendors and is in a far better position than the CLEC to know which of these agreements raise genuine IP concerns.

VI. *SBC's Comments Vastly Overstate the Likelihood that the Provision of Unbundled Network Elements Raises*

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[9] AT&T says that SBC requires AT&T to furnish either licenses from each of the scores of vendors that SBC has identified as having IP rights that may potentially be affected or proof that the vendor consents to the CLEC's access to the element in question. *See* AT&T Comments at 8. By requiring AT&T to prove that no vendor's IP rights are implicated by the provision of unbundled elements by SBC, SBC imposes on the CLEC the difficult task of proving a negative.

[10] *See* AT&T Comments at 8.

[11] *See, e.g.*, Comments of LCI International Telecom Corp. at 8; Comments of the Telecommunications Resellers Association at 8.

[12] *See, e.g.*, Comments of AT&T at 13.

Legitimate IP Concerns, and the Solutions it Proposes Unnecessarily Burden Competition.

The comments of SBC Communications, Inc. and its affiliates ("SBC"), and the attached affidavit of Mr. Roger Milgrim, merit separate treatment. Sprint agrees generally with Mr. Milgrim's summary of the manner in which vendors license their software. Sprint particularly does not doubt SBC's conclusion at page 8 of its Comments that many of SBC's contracts governing the use of a vendor's software (like Sprint's own contracts) 1) do not permit sublicensing, or 2) do not permit SBC to grant access to the software by others.

Sprint entirely disagrees, however, with SBC's conclusions as to the impact of these provisions on the ability of an ILEC to provide unbundled network elements to a CLEC. SBC has provided no specific examples of when the aforementioned software license restrictions would prevent the ILEC from providing these elements. Even if SBC provided such examples, it should be required to demonstrate that such restrictions are widespread. Sprint reiterates its belief expressed earlier that generally sublicensing will not be required and a CLEC will generally not need to obtain access to the vendor's software.

Under SBC's unduly expansive view of a third party's IP rights, a CLEC would be required to negotiate IP rights in virtually every case even where software does not reside on CLEC equipment or CLEC premises and where the equipment using the software will not be under CLEC control. The software would be accessed and operated by an ILEC that is not under the control of the CLEC.

Given the problems that Mr. Milgrim himself recognizes with software licensing, forcing CLECs to obtain licenses in the scenario enumerated above is commercially unreasonable: the CLEC is likely to have no ability to determine if the ILEC is using the software in a manner beyond the scope of the CLEC's license (*e.g.* for someone else). Moreover, since the software is located on computers at the ILEC's premises, the ILEC is in the best position to monitor use of the software. Finally, the party that is most likely to breach any confidentiality provisions in the CLEC's license is likely to be the ILEC.

Until SBC provides concrete examples of IP problems, it is speculation at best to suggest that the CLEC will have widespread access to software at the ILEC's premises. It is also speculative to conjure scenarios where the CLEC will somehow copy software that is operated and controlled by the ILEC.

Sprint also disagrees with the proposition advanced by SBC[13] that CLECs will have substantial leverage in negotiating license agreements with vendors who have already licensed their IP to the ILEC. As SBC recognizes, in a typical IP negotiation between an ILEC and its vendor, if the price, restrictions, and other terms desired by the vendor are perceived to be unreasonable by the ILEC, the ILEC can choose software from another supplier. However, SBC fails to point out that CLECs do not have any of these normal bargaining chips. The CLEC is, of necessity, captive to whatever vendor the ILEC has chosen, regardless of price, terms and conditions.

SBC speculates that some CLECs may already have contractual relationships with the same vendors, but fails to indicate how the mere existence of these other relationships strengthens the CLEC's ability to bargain, given the fact that the CLEC is already tied to vendors selected by the ILECs. To obtain access to unbundled elements, a CLEC *must* have parity with the ILEC with respect to equipment and software that the ILEC has already selected. The CLEC cannot choose equipment of its own.

Sprint also notes, with respect to the CLEC's ability to bargain with an ILEC's software vendor, its own experience is that such vendors often initially provide

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[13] Others made the same argument. *See, e.g.*, Comments of Bell

software at nominal cost in order to obtain substantial compensation in the future through software maintenance and upgrade fees. Unless caps on these fees are negotiated in advance, a customer can expect significant price increases. It is unlikely that an ILEC would negotiate for such caps specifically for the CLEC. As a result, the CLEC licenses, if negotiated for separately, would likely contain substantial disadvantages which software vendors currently exploit to the maximum.

ILECs select and negotiate for the software that is used in their networks. If ILECs are not required to negotiate rights sufficient to enable them to provide unbundled network elements to CLECs, the ILECs will have an incentive not to obtain rights that they could easily obtain, or which they would normally obtain anyway. It is also likely that the ILECs will receive favorable treatment and pricing because software vendors will be under no constraints when it comes time to negotiate with the CLECs, who have no bargaining power.

The bottom line is that the ILEC has the ability to choose another supplier. The CLEC does not. Clearly, the ILEC is in the better position to negotiate any necessary licenses. The ILEC can obtain license of proper scope that will permit the provision of unbundled elements that will

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Atlantic/NYNEX at 4.

occur under their direct control, and they will have all the negotiating leverage to obtain such licenses. As ILECs continue to acquire new or updated software, common sense dictates that the ILECs obtain at the outset any rights necessary to provide unbundled elements.

Under SBC's proposal, Sprint believes there is significant risk that the ILEC will require a CLEC to obtain licenses where no license is actually required. Under that proposal, some process will be required to determine the actual scope of SBC's current license agreements. If SBC withholds unbundled elements during this process, competition is delayed, which advantages only the ILEC.

Indeed, if the ILEC agreements contain confidentiality provisions, it may be difficult or even impossible for regulators to determine the scope of these agreements, for such third party review may not be permitted or may be established only after lengthy and costly litigation. As a result, SBC will have an incentive to list *every* license agreement and require that additional licenses be obtained even where none are needed. Again, the CLECs will have insufficient facts, little negotiating leverage, and an inability to effectively determine whether a license is even required. The ILEC holds all the cards.

If SBC is correct in its argument that it will not be burdensome for CLECs to negotiate the additional licenses, then the ILECs should find it even less burdensome given the inherent advantages they have. If SBC is incorrect as to the burden faced by the CLECs, then SBC's proposal will place the CLECs at a significant competitive disadvantage.

As to patent infringement issues raised by SBC, SBC fails to recognize that the CLECs have the same risk as the ILECs. SBC suggests that because of a CLEC's unique network configuration which is unknown to the ILEC, the ILEC may be at risk of patent infringement. Assuming this is an actual risk, which Sprint does not concede, SBC fails to recognize that since the CLECs are connecting their own network to the ILEC's, the CLECs face the same risk for changes made by the ILEC to the latter's own network without knowledge by the CLEC.

The risk for infringement of patents should reside with the owner of the network in which the primary infringing activity takes place. If an ILEC obtains patent licenses to conduct an activity in the ILEC's network, the ILEC should obtain sufficient rights so that an ILEC does not infringe solely by connecting to a CLEC's network. Alternatively, if the primary activity that causes infringement is in the CLEC's network, the ILEC should receive protection if it is infringing solely by means of connecting to the CLEC network.

It also appears, however, that SBC seeks to have the CLECs obtain IP licenses for rights that SBC failed to negotiate for itself. The chart developed by Mr. Milgrim in his affidavit indicates that in a substantial number, if not a majority, of the cases, SBC failed to obtain any patent license for itself. Now that competition is looming, however, it appears SBC would require the CLECs to obtain such patent rights for unbundled elements. SBC also seeks indemnification for patents related to the use of software in SBC's network where SBC itself failed to obtain any patent rights. If, as it appears, SBC is now pushing CLECs to obtain patent licenses that SBC itself has not bothered to obtain, it is reasonable to infer that SBC's real concern is not with the infringement of a third party's IP, but with potential competition.

In sum, SBC has failed to provide any concrete examples of when third party IP rights would be affected by the provision of unbundled network elements. Sprint believes that such unbundling will not generally implicate licensing and access rights. However, SBC's proposal that the CLEC obtain license rights is much more likely to raise IP issues because of the ILEC's major role in the provision of unbundled elements.

To repeat, because the software is on the ILEC's premises and operated by the ILEC, it is the ILEC who is most likely to infringe upon the rights of third parties or to breach confidentiality and use restrictions. ILECs and CLECs should each be responsible for obtaining any necessary rights that are required by their own networks because of unbundling. The network owner who initially selects the supplier of IP rights, such as software, for its network, or who has the ability to replace an uncooperative supplier is in the best position to acquire any necessary rights.

Placing this burden on the CLECs gives the ILEC an unearned and unwarranted competitive advantage and significantly deters competition. The ILECs should therefore not be given an incentive to negotiate narrow rights that will place CLECs at a competitive disadvantage. SBC's proposal would have just this effect.

CONCLUSION

Sprint continues to believe, consistent with the *Infrastructure Sharing Order*, that the ILEC should have the burden of negotiating in good faith with its vendors to obtain any license agreements or extensions necessary to provide unbundled network elements to CLECs and that this burden should be a substantial one.[14] If the ILEC cannot do

[14] If there are any additional costs that are incurred by the ILEC in order to negotiate additional rights necessary to provide unbundled network elements, such costs should, to the extent they are reasonable, be reimbursed by the CLEC. Recurring license fees or royalties should be structured so as to not discriminate between an ILEC and a CLEC.

so because of its existing[15] agreements despite its best efforts, it should then have to identify specifically for a requesting CLEC those IP agreements which the ILEC believes would (not might) be violated by the provision of unbundled elements. The ILEC should also explain briefly in writing to the CLEC the basis for the ILEC's belief.

The Commission should warn ILECs that identification by the ILEC of third party agreements to the CLEC without a reasonable basis for believing that a third party's IP is implicated by the agreement will be considered negotiating in bad faith. The Commission should also make clear that a consistent failure by an ILEC to negotiate terms with a vendor that permits the ILEC to freely provide unbundled network elements to CLECs may result in the Commission restricting the ILEC's ability to do business with that vendor.

Given the proper incentives and a procedural framework, CLECs and ILECs should be able to negotiate a solution to IP issues without the need for further regulatory intervention in almost every case. That should be the Commission's goal. Sprint believes its proposal will achieve the desired result.

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[15] Sprint also believes that the Commission should make clear that ILECs are henceforth not permitted to negotiate on a going forward basis IP agreements that would inhibit or prevent the ILEC from providing unbundled network elements. Agreement to such license terms should present a *prima facie* case of bad faith by the ILEC.

Respectfully submitted,

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May 6, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY COMMENTS OF SPRINT** was sent by hand or by United States first-class mail, postage prepaid, on this the 6th day of May, 1997 to the below-listed parties

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